

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF TENNESSEE

In re:

No. 95-13392
95-13393

AFP, INC.
AFP COLOR LABS, INC.

Chapter 7

Debtors

ADVANCED PHOTOGRAPHIC
SOLUTIONS, LLC

Plaintiff

v

Adversary Proceeding
No. 97-1240

THE INDUSTRIAL DEVELOPMENT
BOARD FOR THE CITY OF CLEVELAND,
TENNESSEE, CITY OF CLEVELAND,
TENNESSEE, AND BRADLEY COUNTY,
TENNESSEE

Defendants

MEMORANDUM AND ORDER

The plaintiff, Advanced Photographic Solutions (“APS”), commenced this adversary proceeding by filing a motion, but the court has treated it as a complaint and will refer to it as a complaint. The defendants are the Industrial Development Board of the City of Cleveland, Tennessee, the city itself, and Bradley County, Tennessee, which is the county where the city is located. The dispute concerns a tax reduction agreement between the defendants and AFP Color Lab (Color Lab).

Color Lab filed a Chapter 11 bankruptcy case and immediately filed a motion to sell most of its assets outside the ordinary course of business. The court approved a sale to APS. APS's complaint alleges that the sale included Color Lab's rights under the tax reduction agreement, but the defendants have violated the court's sale order by refusing to allow APS the benefit of the agreement.

An exhibit to the complaint is a letter to the Bradley County Tax Assessor from Lori Gray, a vice-president in the Bradley County Chamber of Commerce. The letter states her view that APS did not acquire Color Lab's rights under the tax reduction agreement.

The defendants' answer to the complaint does not deny that APS acquired Color Lab's rights under the tax reduction agreement. The answer denies that APS has met the performance requirements imposed by the agreement as a condition to obtaining the reduction in taxes. The defendants have filed a motion to dismiss for lack of jurisdiction. The defendant's motion relies primarily on their own failure to deny that APS took the place of Color Lab as a party to the tax reduction agreement. The defendants assert that in light of this admission, the controversy no longer has anything to do with Color Lab's bankruptcy case; it is simply a dispute between two outsiders concerning the requirements of a contract between them.

APS's response addresses the merits to some extent. APS asserts that it has met the performance requirements and that the defendants are attempting to impose requirements not in the tax reduction agreement. APS makes these statements for an obvious reason. It wants to convince the court that the defendants are still attempting to avoid the effect of the bankruptcy sale and deny APS its rights under the tax reduction agreement, but they are doing it by more subtle means.

If the only question is whether APS has complied with the tax reduction agreement, the court doubts that it has subject matter jurisdiction. Color Lab's rights under the agreement were an asset acquired by APS. But the terms of the agreement are not terms of the sale contract or the court's order approving the sale. APS also has not revealed how a decision can affect the bankruptcy estate or the administration of the case. Compare, *Michigan Employment Security Commission v. Wolverine Radio Co., Inc. (In re Wolverine Radio Co.)*, 930 F.2d 1132 (6th Cir. 1991); *In re Lawrence United Corp.*, 221 B.R. 661 (Bankr. N. D. N. Y. 1998); *Free-Tan Corp. v. 49-50 Associates (In re Liberty Music and Video, Inc.)*, 50 B.R. 379 (S. D. N. Y. 1985).

These cases reveal, however, that the courts have struggled to decide when they have jurisdiction over controversies between the buyer in a bankruptcy sale and a third party. Furthermore, the defendants' motion to dismiss for lack of jurisdiction never mentions the statute that deals with subject matter jurisdiction, subsection (b) of 28 U.S.C. § 1334. The motion relies instead on § 1334(c)(2). 28 U.S.C. § 1334(b) & (c).

Paragraph (c) of § 1334 deals with abstention even though the court has jurisdiction. Section 1334(c)(2) provides for mandatory abstention. Of course, mandatory abstention will usually have the same practical effect as lack of subject matter jurisdiction; the dispute will end up in another court.

Mandatory abstention applies only when a proceeding "is commenced and can be timely adjudicated in a State forum of appropriate jurisdiction." 28 U.S.C. § 1334(c)(2). The defendants' motion to dismiss states that the issues regarding APS's performance of the agreement are for the state court. But the motion never identifies any pending state court proceeding. The record does not contain any other evidence of a pending case in state court or any other state forum. As a result, the court can

not hold that it must abstain under § 1334(c)(2). *Sapir v. Hudson Realty Co. (In re Rosalind Gardens Associates)*, 158 B.R. 15, 18 (S. D. N. Y. 1993); *Flores v. Telemundo Group*, 133 B.R. 674, 676 (D. P. R. 1991); *Contained Transport, Inc. v. Scott Paper Co. (In re Container Transport, Inc.)*, 86 B.R. 804, 806 (E. D. Pa. 1988); *Nationwide Roofing & Sheet Metal, Inc. v. Cincinnati Ins. Co. (In re Nationwide Roofing & Sheet Metal, Inc.)*, 130 B.R. 768, 778-79 (Bankr. S. D. Ohio 1991).

Section 1334(c)(1) provides for permissive abstention “in the interest of justice, or in the interest of comity with State courts or respect for State law.” 28 U.S.C. § 1334(c)(1). Furthermore, the court can decide to abstain under this provision even if a party has not filed a motion requesting it. 28 U.S.C. § 1334(c)(1) & (c)(2); *Gober v. Terra + Corp. (In re Gober)*, 100 F.3d 1195, 1207 n. 10 (5th Cir. 1996); *Clayter v. Larkin (In re Clayter)*, 174 B.R. 134, 141-42 (Bankr. D. Kan. 1994).

This is an appropriate case for discretionary abstention. Neither party is the debtor in a bankruptcy case. The remaining issues involve the meaning of the tax reduction agreement and will be controlled by Tennessee law. APS has not shown that the outcome will affect the bankruptcy estate or the administration of the bankruptcy case. Enforcement of the tax reduction agreement does not amount to enforcement of an order entered by this court. If the defendants are asserting erroneous or even frivolous grounds for denying APS the benefit of the tax reduction agreement, the state courts can deal with the problem as well as this court. *See In re Mall At One Associates*, 185 B.R. 1009 (Bankr. E. D. Pa. 1995); *Beneficial National Bank USA v. Best Reception Systems, Inc. (Best Reception Systems, Inc.)*, 220 B.R. 932, 952-58 (Bankr. E. D. Tenn. 1998).

Of course, the court’s decision depends on the defendants’ admission that APS took the place of Color Lab as a party to the tax reduction agreement. The court has no reason to expect the

defendants will take the opposite position in the state courts. In any event, the state courts will not allow it because they follow the law of judicial estoppel. *Allen v. Neal*, 217 Tenn. 181, 396 S.W.2d 344 (1965); *Decatur County Bank v. Duck*, 969 S.W.2d 393 (Tenn. Ct. App. 1998); *Leatherwood v. United Parcel Service*, 708 S.W.2d 396 (Tenn. Ct. App. 1986); *Love v. Cave*, 622 S.W.2d 52 (Tenn. Ct. App. 1981). Furthermore, the court's decision to abstain does not necessarily bar APS from bringing another action in this court if the defendants change their position. For the reasons stated, this court shall abstain from further consideration of this controversy. Accordingly,

It is ORDERED that the motion to dismiss is GRANTED on grounds other than those stated in the motion; and

It is FURTHER ORDERED that this proceeding is DISMISSED.

ENTER:

BY THE COURT

entered September 15, 1998

R. THOMAS STINNETT
UNITED STATES BANKRUPTCY JUDGE